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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 66

WILLIAM A. REILING, *Petitioner*,

v.

BELDIN H. LOFTSGAARDEN, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

I

The Issues Are Defined by *New York Times Co. v. Sullivan*

The relevant case for our purposes is obviously *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Petitioner claims, in addition to his claim of an infringement of his freedom of speech, that he was denied a jury trial. This is quite untrue, as will appear below, but in any event he has no federal constitutional right to a trial by jury in state court. *Minneapolis & St. L. Ry. v. Bombolis*, 241 U.S. 211 (1916).

The *Sullivan* case holds that a state's manner of enforcing its civil libel laws may infringe the constitutionally protected

rights of freedom of speech and of the press. The law of Alabama, as there applied, was held constitutionally deficient in two respects:

(1) It does not require proof of "actual malice" (except in order to recover punitive damages) and does not permit the defense of fair comment unless the facts upon which the comment is based are in fact true;

(2) The court accepted as adequate proof of "actual malice" to go to a jury evidence which lacked the convincing clarity which the constitutional standard demands.

II

The Judgment Below Does Not Violate the Standard There Set Up

The law of Minnesota presents neither of these features, and is hence not constitutionally deficient as abridging freedom of speech or press.

A. *The substantive law of Minnesota accords with the standard.*

Minnesota requires a public official, before he can collect any damages, either compensatory or punitive, for libel, to prove actual malice. *Friedell v. Blakeley Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925). Thus the first point of attack upon Sullivan's judgment does not arise here.

B. *Petitioner has disabled himself from contending that the evidence does not support the verdict.*

The other question—whether the evidence *in this case* was such that it can constitutionally support the judgment—presents a greater problem, for here we are involved in a procedural difficulty of petitioner's own making. A short explanation of some of Minnesota's appellate procedure and how it was applied here is necessary.

This case was tried in the ordinary way of common-law actions in Minnesota—before a jury of twelve. Record, p. 7. The verdict was for plaintiff, with "$0 * * * for general damages and $5,000 for punitive damages." The trial judge, because he believed the law of Minnesota to be that one cannot have punitive damages unless there is an award of general or compensatory damages, ordered judgment for the defendant. Defendant (now petitioner) did not cause judgment to be entered on this order for about 7½ months. Plaintiff had meanwhile done nothing. (A judgment was at that time appealable in Minnesota within 6 months from its entry. M.S.A. §605.08. An order for judgment is not appealable at all.) Within the six-month period, but towards its end, plaintiff filed his appeal from the judgment to the Supreme Court of Minnesota.

At or about the same time as he filed his notice of appeal, plaintiff gave notice that he would propose the stenographic transcript of the trial as the "settled case" on appeal. The settled case is the only way in Minnesota by which the appellate court can be apprised of what took place at the trial. It partakes of the nature of a bill of exceptions to the extent

that it requires to be approved—"settled"—by the trial judge before it can be judicially noticed by the appellate court. In order to have a settled case, the proponent must propose it within certain time limits prescribed by Minn. R. Civ. P. 59.07. The trial judge may, in his discretion, extend these time limits, with or without a formal motion to that effect.

When plaintiff (respondent here) proposed the settled case, it was opposed by petitioner upon the sole ground that the proposal was not timely. The trial judge sustained the objection. Respondent Loftsgaarden obtained a writ of certiorari from the Minnesota Supreme Court to review this action. Petitioner Reiling successfully opposed such review. The Minnesota Supreme Court refused to reverse the trial judge. *Loftsgaarden v. Reiling*, 120 N.W. 2d 857 (Minn. 1963).

As a result of all this maneuvering, then, it was necessary to present respondent's case to the Minnesota court without a transcript of the evidence—that is, entirely upon the so-called "strict record." This means, generally speaking, only those papers which are properly filed with the clerk of the court of first instance: the pleadings, pretrial motions and orders, if any, the verdict, any postverdict motions and orders, and the judgment itself. That is the Record which has been submitted to this court in connection with the petition for certiorari.

For obvious reasons, Minnesota holds that the lack of a settled case rather severely restricts the scope of appellate review. For instance, whether the evidence supports the verdict cannot be considered in the absence of a report of the evidence. Nor can the propriety of the trial court's instructions to the jury be examined, since they are not reported.

As a practical matter, indeed, about the only question that can be presented in the ordinary case is whether the verdict supports the judgment, and that is all that was open to Mr. Loftsgaarden here.

Whether the verdict supported the judgment which was entered (for the defendant) turned, of course, on whether punitive damages can be awarded in the absence of an award of general damages. The Minnesota court held that they could, and consequently ordered judgment for the plaintiff, which has since been entered.

Now, the point of all this perhaps over-elaborate explanation is this—petitioner vigorously and successfully fought to prevent respondent from presenting a report of the evidence to the Minnesota Supreme Court. No doubt he thought it was to his advantage to do so. With this we cannot quarrel, though hindsight shows that graceful acquiescence in the untimeliness would perhaps have been better. But we can and do quarrel with him when he attempts to suggest that the lack of a transcript was imposed upon him *in invitum*, and that review of the (then non-existent) constitutional question of the adequacy of the evidence was denied him by anything other than the procedural impasse he worked hard to create. Had he permitted the Minnesota court to read the evidence, it would have been open to him to contend in support of the judgment below that the facts would not constitutionally support a finding of actual malice. The route he chose made this, and other similar contentions (as, *e.g.*, that some element of a cause of action for libel was missing as a matter of law), unavailable to him. Instead he contended

(see Respondent's Brief below) that (1) because of the lack of a settled case, *nothing* was presented for review(!), and (2) that there can be no punitive damages in the absence of an award of general damages.

Thus it appears that the petitioner wants this court to declare that a Minnesota Rule of Civil Procedure which he enthusiastically enforced denies to him a constitutional right. He would also have this court say to Minnesota that it must cease to enforce its rules of appellate procedure in any case where the defeated litigant may later claim that an examination of the evidence may be essential to the adjudication of a constitutional issue, even where it is that very litigant who demands that it enforce the rule. (Note that no constitutional issue had been raised by anyone at any time in this proceeding until the petition for rehearing was filed.) The question amounts to this: May one demand the enforcement of a rule, secure the court's acquiescence in his demand, and then claim that the court, by doing what he asked it, denied him a constitutional right?

Instead of making these facetious claims, petitioner should make available to this court the transcript of the evidence at the trial. Three copies exist, of which petitioner has one, respondent another, and the clerk of district court the third. We will be happy to submit our copy for the use of the court. We are confident that an examination of it will disclose that the jury's finding of actual malice has ample support, by constitutional or any other criteria. The court can thus satisfy itself that no true constitutional issue exists in this case.

CONCLUSION

The substantive libel law of Minnesota is not violative of the First Amendment, for it requires a public official to prove actual malice in order to recover any damages.

The Supreme Court of Minnesota had no report of the evidence available to it because petitioner insisted that it should not. He now claims that a necessary result of his success in that contention is a denial of his constitutional rights. This claim is not available to him under the circumstances.

In any event, we are quite willing to have this court read the transcript. Having done so, it will, we are confident, find no substantial constitutional issue to be presented.

Respondent requests that certiorari be denied.

Respectfully submitted,

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